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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY LEE THORNBURG, Defendant and Appellant.	G053278 (Super. Ct. No. 13HF2342) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Joy W. Markman, Steven D. Bromberg and Kimberly Menninger, Judges. Affirmed as modified.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne G. McGinnis and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Timothy Lee Thornburg of second degree robbery with personal use of a firearm (Pen. Code §§ 211, 212.5, subd. (c), 12022.53, subd. (b))[1] and second degree commercial burglary (§§ 459, 460, subd. (b)). The court imposed a prison term of 12 years, consisting of concurrent two-year terms for robbery and burglary, plus a consecutive 10-year term for personal use of a firearm.

Thornburg contends the court erred when it denied his motions to suppress evidence under section 1538.5, because there was no probable cause to arrest him for violating either a San Clemente Municipal Code regulating skateboarding, or section 148, subdivision (a)(1) barring resisting, obstructing or delaying a peace officer. We disagree.

Thornburg also contends the court erred when it denied his motions to suppress, because taking a buccal swab for DNA testing was an illegal search in violation of the Fourth Amendment to the United States Constitution. We are not persuaded.

Next, Thornburg contends the court erred by admitting testimonial hearsay through the prosecution's DNA expert, in violation of the California rules of evidence and the Sixth Amendment to the United States Constitution. Again, we disagree.

Finally, Thornburg contends the court erred by imposing sentence for both robbery and burglary, in violation of section 654. The Attorney General concedes this error. We agree and modify the sentence and abstract of judgment accordingly.

We affirm the judgment in all other respects.

FACTS AND PROCEDURAL HISTORY

The Walmart Crimes

Early one morning in March 2010, a man wearing a black, hooded sweatshirt pulled up over his baseball cap entered a Walmart store in San Clemente. The man stopped at a Coinstar kiosk next to an ATM (automated teller machine), and then entered a men's restroom behind the customer service desk.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

Walmart employee Nicholas Chiarilli was in the men's restroom, and he saw a white male with a hooded sweatshirt "either washing [his] hands [or] doing something with [his] hands." Chiarilli saw the man's side profile "from the cheek bone to the high cheek down to [his] lower jaw."

Next the man went into the Walmart stockroom, which the employees informally referred to as the "money room." Walmart employee Justan Dunn walked into the money room, and he saw the man in a dark, hooded sweatshirt pointing a gun at him.

The man told Dunn, "I want the money. Give me the money." Dunn explained he had just stocked the cash registers and did not have any more money. The man demanded Dunn fill a duffle bag with the backup cash. Dunn complied out of fear and placed about $1,600 dollars in the duffle bag.

After the man left the stockroom, Dunn called the police.

Deputy Sherri Mannello responded to the Walmart. Chiarilli described the man he saw as five feet, eight or nine inches tall, 110 to 120 pounds, and wearing a baseball cap and hooded black sweatshirt. However, he was unable to positively identify a suspect when shown a photographic lineup.

Dunn told Mannello he "didn't focus on the face" of the gunman, and he could not identify a suspect at that time.[2]

After talking to the eyewitnesses, Mannello reviewed the store's surveillance camera footage, which the parties later agreed accurately depicted the robbery from several different camera angles. In doing so, she noticed the gunman had entered the store holding a coffee cup, but he exited the store without it.

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[2] The Attorney General asserts Dunn identified Thornburg as the gunman at trial, but the record is unclear. Dunn testified he recognized several people in the courtroom, including the investigating officer and "the man in glasses" to the prosecutor's right, but the record does not reveal whether the man in the glasses was Thornburg.

Later, another investigator collected a brown coffee cup from a trash can in the men's room. The coffee cup and the money room door handle were swabbed for DNA, and the cup was dusted for fingerprints. However, investigators were not able to identify a suspect and the case went cold.

The Skateboarding Incident

One afternoon in December 2011, Sheriff's Deputy Jeffrey Hewitt was driving a patrol car southbound on El Camino Real in San Clemente, when he saw Thornburg skateboarding northbound, on the opposite side of the street. El Camino Real is a four-lane street, with a significant downhill grade, and Thornburg was using the two downhill lanes to make long, slow S-turns on his skateboard.

Hewitt turned around to initiate a "pedestrian" stop for a violation of San Clemente Municipal Code section 10.64.020, subdivision (A).[3] Hewitt first turned on the steady red light in the emergency lights on top of his vehicle. Thornburg looked back at Hewitt, but he did not stop.

Hewitt next turned on his flashing red and blue emergency lights and chirped his siren. At that point Thornburg turned around, held up a hand, and waived at Hewitt, but he still did not stop. Hewitt then picked up his loudspeaker microphone and ordered Thornburg to stop. This time, Thornburg put down one foot and tried to slow down, but then continued. Thornburg eventually did stop. Hewitt estimated the gap between the time when Hewitt first chirped his siren and the time when Thornburg finally stopped skateboarding was approximately 15 seconds.

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[3] San Clemente Municipal Code section 10.64.020, subdivision (A), states, "no person shall use or operate a skateboard on a public or private street or alley in the City if there is a sidewalk adjacent and parallel to the street." Hewitt testified that a violation of this code section normally results in a citation, not an arrest.

Thornburg was holding his skateboard in his hands as Hewitt approached and asked Thornburg "what he was doing." Thornburg asked Hewitt why Hewitt stopped him. Hewitt told Thornburg skateboarding in the street was a violation of the San Clemente Municipal Code.

Thornburg told Hewitt another police officer had told him it was okay to skateboard in the street, so long as he obeyed the rules. Thornburg continued to argue the point, even after Hewitt explained to him it was a violation. Hewitt testified Hewitt "had given him almost the whole municipal code, and he just continued."

While Thornburg argued, Hewitt noticed two, baseball-sized bulges in Thornburg's pockets. Hewitt thought the bulges could be weapons. Thornburg was significantly taller than Hewitt, and his combative demeanor and bulging pockets prompted Hewitt to call for backup. Hewitt also feared Thornburg might use the skateboard he was holding as a weapon.

Hewitt wanted to pat Thornburg down for weapons: "Due to the bulges in the pockets, due to he was arguing the issue for the stop. It's not common that somebody skateboards in the street. That's a place for vehicles. He was a tall gentlem[a]n. I was out there by myself." But Hewitt did nothing more until his backup arrived.

After another deputy arrived, Hewitt told Thornburg he wanted to conduct a patdown search for weapons. Thornburg refused and "became very verbally argumentative . . . ." Although Hewitt believed he had the right to conduct a patdown search without consent, he telephoned his sergeant to discuss the situation.

After talking briefly with his sergeant, Hewitt again asked Thornburg for consent to conduct a patdown search. Thornburg again refused, and demanded to know Hewitt's probable cause to conduct a search. Hewitt believed Thornburg was just going to continue to delay him, so he arrested Thornburg for "delaying an officer in the course of his duties . . . " in violation of section 148, subdivision (a).

The whole incident lasted about 30 minutes.

The Searches and the Motions to Suppress

During the search incident to Thornburg's arrest for delaying an officer, Hewitt found methamphetamine and marijuana in his pockets. Hewitt then booked Thornburg for felony possession of methamphetamine, and Thornburg provided a buccal swab for identification analysis as required by sections 296 and 296.1.

Thornburg's buccal swab was submitted to a statewide DNA database system known as "CODIS." Five months later, CODIS notified the Orange County District Attorney's Office that the DNA profile from Thornburg's buccal swab matched the DNA profile from the coffee cup found after the Walmart incident.

Once the Orange County Crime Lab confirmed the two DNA profiles matched, Thornburg was arrested for the Walmart crimes. Investigators then executed a search warrant at Thornburg's home and found two revolvers, a replica semiautomatic handgun and methamphetamine.

On July 26, 2012, the district attorney filed a complaint under case No. 12HF2123, charging Thornburg with second degree robbery, a gun-use enhancement, and second degree commercial burglary. Thornburg moved to suppress the evidence seized as a result of his arrest for delaying an officer, including the buccal swab sample and the DNA results. Judge Joy W. Markman granted the motion and suppressed the evidence, reasoning Thornburg's refusal to allow a patdown search could not provide probable cause to arrest him for delaying or obstructing an officer.

The district attorney then dismissed and refiled the complaint under case No. 13HF2342, again charging Thornburg with second degree robbery, a gun-use enhancement, and second degree commercial burglary. A separate complaint filed the same day under case No. 13HF2343 charged Thornburg with felony possession of methamphetamine (former Health & Saf. Code, § 11377, subd. (a)), misdemeanor resisting, delaying or obstructing a peace officer (§ 148, subd. (a)), and possession of marijuana (Health & Saf. Code, § 11357, subd. (b)), an infraction.

Thornburg filed a second motion to suppress, seeking to exclude both the evidence seized during his arrest for delaying an officer, and the evidence seized during the search of his home. He argued the evidence was "obtained as a result of an unlawful stop, detention, search and seizure . . . ." He also argued seizure of his DNA (buccal swab) under sections 296 and 296.1 was unconstitutional.

The parties stipulated the second motion to suppress would be heard concurrently in both then pending cases (13HF2342 & 13HF2343), and the evidence in the first hearing was to be considered as the evidence in the second hearing.

Judge Markman denied the second motion to suppress. The court found Hewitt had probable cause to detain Thornburg for violating San Clemente Municipal Code section 10.64.020, subdivision (A), and to arrest him for violating section 148, subdivision (a)(1). The court specifically found his refusal to stop in response to Hewitt's emergency lights, siren, and loudspeaker order, and his combative attitude during the detention, "caused the delay in the legal performance of Deputy Hewitt's duties . . . ." Finally, the court rejected Thornburg's constitutional challenge to the DNA collection under sections 296 and 296.1.

After Thornburg was held to answer, he renewed his motion to suppress in both then pending cases (13HF2342 & 13HF2343), as authorized by section 1538.5, subdivision (i). In his renewed motion, Thornburg argued Judge Markman erred by denying his second motion, because there was no probable cause to arrest him for delaying an officer, and because sections 296 and 296.1 are unconstitutional.

Judge Steven D. Bromberg denied the renewed motion to suppress. The court found Hewitt had probable cause to arrest Thornburg for delaying an officer in violation of section 148, subdivision (a)(1), because, "He doesn't pull over on the skateboard." The court further explained, "As much as this never should have happened -- but it's all on the defendant for happening. . . . If it's an arrest, it's an arrest. Notwithstanding what the motivation of the officer was, he got it right."

After the jury convicted Thornburg of the Walmart crimes in this case (13HF2342), he appealed from the judgment. He also pled guilty to methamphetamine possession in the other case (13HF2343), but he did not appeal from that judgment. [4]

DISCUSSION

1. The Motions to Suppress – Probable Cause to Arrest

Thornburg challenges the denials of his motions to suppress on three grounds: (1) the San Clemente Municipal Code skateboarding violation did not justify an arrest or patdown search, citing *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323 (misdemeanor seatbelt violation), (2) Hewitt unreasonably delayed the initial detention beyond the time necessary to issue a citation for the skateboarding violation, citing *Rodriguez v. United States* (2015) 575 U.S. __ [135 S.Ct. 1609]); and, (3) Hewitt lacked probable cause to arrest him for a violation of section 148, subdivision (a)(1).

Thornburg's first two arguments focus on the skateboarding violation that provided the grounds for the initial detention. But, Thornburg never challenged the legality of the initial detention below, and neither Judge Markman nor Judge Bromberg relied on the skateboarding violation as a separate and sufficient basis for their rulings. Instead, both judges concluded Hewitt had probable cause to arrest Thornburg for violating section 148, subdivision (a)(1). Thus, we must independently review the trial courts' determinations that Hewitt had probable cause to believe Thornburg committed that offense. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1036-1037 (*Kraft*).)

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[4] Because Thornburg did not appeal from the judgment in case No. 13HF2343, the courts' denials of Thornburg's second and renewed motions to suppress in that case are now final. Since the parties, the motions, the evidence and the rulings in that case, and in this case, are identical, Thornburg could conceivably be barred from challenging those identical rulings in this appeal, by the doctrines of res judicata or collateral estoppel. (See *People v. Beltran* (1949) 94 Cal.App.2d 197, 203-205.) However, the parties have not raised or briefed these issues and we express no opinion on them.

"Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime. [Citation.]" (*Kraft, supra*, 23 Cal.4th at p. 1037.) "In determining whether probable cause . . . existed, 'we examine the events leading up to the arrest, and then decide "whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause . . . .' [Citation.]" (*People v. Turner* (2017) 13 Cal.App.5th 397, 404-405.) We defer to the courts' factual findings if supported by substantial evidence, but we are required to "independently assess the legal question of whether the challenged search or seizure satisfies the Fourth Amendment." (*People v. Brown* (2015) 61 Cal.4th 968, 975.)

"The legal elements of a violation of section 148, subdivision (a) are as follows: (1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. [Citation.]" (*People v. Simons* (1996) 42 Cal.App.4th 1100, 1108-1109.) Only the first element is disputed here.

The following facts provide ample support for the trial courts' rulings that Hewitt had probable cause to believe Thornburg willfully resisted, delayed or obstructed a peace officer. As noted, when Hewitt first turned on the steady red light on top of his vehicle, Thornburg looked back, but he did not immediately stop. When Hewitt turned on his flashing red and blue lights and chirped his siren, Thornburg turned around, held up a hand and waived at Hewitt, but he still did not stop. When Hewitt picked up his loudspeaker microphone and ordered Thornburg to stop, Thornburg put down one foot and tried to slow down, but he continued. When he finally did stop, Thornburg became aggressive and combative, and he stubbornly refused to accept Hewitt's explanation for the stop, or Hewitt's authority to detain him. At that point, Hewitt became concerned for his own personal safety and was forced to call another officer for backup.

These facts undoubtedly provided Hewitt with an objectively reasonable basis to arrest Thornburg for willfully resisting, delaying or obstructing a peace officer in violation of section 148, subdivision (a)(1). (See generally *People v. Quiroga* (1993) 16 Cal.App.4th 961, 967 (*Quiroga*) [running from investigatory detention constitutes a violation of § 148]; *People v. Lloyd* (1989) 216 Cal.App.3d 1425, 1429 [suspect has no right to resist a lawful detention].) And we see no evidence that Hewitt unduly prolonged the lawful initial detention. Therefore, we independently conclude the challenged arrest and search incident to arrest satisfied the Fourth Amendment.

Thornburg's reliance on *In re Chase C.* (2015) 243 Cal.App.4th 107 (*Chase*) and *Quiroga*, *supra*, 16 Cal.App.4th 961 is misplaced. Both cases dealt with the sufficiency of the evidence to support a criminal conviction. (*Chase,* at pp. 114-116; *Quiroga,* at pp. 971-973.) Here, the bar is lower. Hewitt needed only an objectively reasonable belief Thornburg committed the crime to arrest him.

Moreover, in *Chase*, the appellate court concluded the detention of the minors was unlawful, and the minor's protestation was politically protected speech. (*Chase, supra,* 243 Cal.App.4th at pp. 115-116.) But here, Hewitt lawfully detained Thornburg, and Thornburg does not assert his protestations were protected speech.

In *Quiroga*, while the court decided the defendant's uncooperative conduct at a friend's apartment did not constitute a violation of section 148, his failure to disclose his identity during the booking process "unquestionably served to resist, delay, and obstruct the responsible peace officer in the discharge of his duties." (*Quiroga*, *supra*, 16 Cal.App.4th at p. 972.)

Similarly here, Thornburg not only resisted, delayed and obstructed Hewitt in the discharge of his duties regarding the skateboarding violation, Thornburg continued to resist, delay and obstruct Hewitt throughout the lawful detention. That Thornburg exercised his right to refuse to consent to a patdown search by Hewitt is inconsequential.

The courts correctly denied Thornburg's motions to suppress.

2. The Motions to Suppress – Constitutionality of Sections 296 and 296.1

Thornburg's buccal swab sample was collected pursuant to section 296, subdivision (a)(2)(C) (section 296(a)(2)(C)), and section 296.1, subdivision (a)(1)(A) (section 296.1(a)(1)(A)), both of which are part of the California Forensic Identification Database and Data Bank Act of 1998 (Act).[5] Thornburg contends these statutes violate the Fourth Amendment on their face and as applied in this case. We are not persuaded.

The constitutionality of these statutes is being reviewed by the California Supreme Court. In *People v. Buza* (2014) 231 Cal.App.4th 1446, review granted on February 18, 2015, S223698, the court is considering whether compulsory collection of DNA samples from all adult felony arrestees under sections 296(a)(2)(C) and 296.1(a)(1)(A), violates the Fourth Amendment or article I, section 13, of the California Constitution. In *People v. Lowe* (2013) 221 Cal.App.4th 1276, review granted on March 19, 2014, S215727, the court is considering whether compulsory DNA collection under sections 296(a)(2)(C) and 296.1(a)(1)(A) violates the Fourth Amendment, under the analysis of *Maryland v. King* (2013) 569 U.S. __ [133 S.Ct. 1958] (*King*).

Meanwhile, we must decide this case, and *King* is the most recent United States Supreme Court case which bears directly on the questions presented. *King* held, "DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment." (*King, supra*, 569 U.S. at p. __ [133 S.Ct. at p. 1980].)

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[5] Section 296(a)(1)(C) requires any adult arrested for or charged with any felony to provide buccal swab samples for identification analysis by law enforecement. Section 296.1(a)(1)(A) requires the samples to be provided immediately following the arrest, or during the booking process, or as soon as practicable after the arrest.

The holding in *King* is fatal to Thornburg's constitutional challenges to sections 296(a)(2)(C) and 296.1(a)(1)(A). (*Haskell v. Harris* (9th Cir. 2014) 745 F.3d 1269 (*Haskell*).) As Ninth Circuit observed, "[The] facial and as-applied challenges turn on essentially the same question: Is California's DNA collection scheme constitutional as applied to *anyone* 'arrested for, or charged with, a felony offense by California state or local officials?' After [*King*], the answer is clearly yes." (*Id.* at p. 1271.)

Notwithstanding this observation in *Haskell*, Thornburg would distinguish *King* based upon differences between the Act and the Maryland DNA collections statutes. However, the concurring opinion in *Haskell* considered and rejected all these purported distinctions. (*Haskell, supra,* 745 F.3d at pp. 1271-1275 (conc. opn of Smith, J.).)

First, Thornburg observes sections 296(a)(2)(C) and 296.1(a)(1)(A) require DNA collection from persons arrested for any felony, while Maryland's DNA collection statutes only apply to persons charged with a crime of violence[6] or burglary. But "the California law's limitation to felony arrests is not meaningfully different from the Maryland law's restriction to certain 'serious crimes.'" (*Haskell, supra,* 745 F.3d at p. 1273 (conc. opn of Smith, J.).) And *King* does not suggest the state's compelling interest in identifying the arrestee, varies "with the 'seriousness' of the felony at issue." (*Ibid.*)

Second, he notes the Act allows police to analyze a DNA sample upon arrest, without a prior judicial determination of probable cause, whereas in Maryland, DNA may not be processed before the arrestee is arraigned and a judicial officer ensures there is probable cause. But "[t]he government's interest in identifying arrestees attaches 'when an individual is brought into custody,' [citation], irrespective of whether the suspect is ultimately charged.'" (*Haskell, supra,* 745 F.3d at p. 1274 (conc. opn of Smith, J.).) Thus, "these differences are not constitutionally relevant." (*Id.* at p. 1273.)

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[6] Maryland law defines a crime of violence to include murder, rape, first-degree assault, kidnaping, arson, sexual assault, and a variety of other serious crimes.

Third, Thornburg remarks the Act does not provide for automatic expungement, though in Maryland the DNA sample is destroyed if there is no finding of probable cause, and the DNA profile is automatically expunged if there is no conviction. These differences too are, "not constitutionally relevant." (*Haskell, supra*, 745 F.3d at p. 1274 (conc. opn of Smith, J.).) "[T]here is strong reason to believe that the differences in expungement procedures between Maryland and California are not as great as [Thornburg] suggest[s]." (*Ibid.*) "In any event, the *King* Court did not view Maryland's expungement procedures as important to the constitutionality of Maryland's law. The Fourth Amendment search at issue is a buccal swab, and the 'minor intrusion' that this 'brief' procedure represents is not affected at all by the availability of expungement procedures. [Citation.] While the Supreme Court also analyzed whether the processing of the arrestee's DNA sample intruded on his privacy interests, it did not suggest that post-collection expungement procedures would affect the constitutional inquiry. [Citation.]" (*Ibid.*, citing *King, supra*, 569 U.S. at pp. __ [133 S.Ct. at pp. 1979-1980].)

We believe the reasoning of the concurring opinion in *Haskell* is persuasive. Consequently, we conclude Thornburg's attempt to distinguish *King* fails.[7]

Finally, leaving aside *King*, we note reasonableness is the ultimate measure of the constitutionality of a governmental search. (*Samson v. California* (2006) 547 U.S. 843, 848; *People v. Robinson* (2010) 47 Cal.4th 1104, 1120; *People v. Williams* (1999) 20 Cal.4th 119, 125.) A violation of privacy must be balanced against the government's compelling interests in identifying arrestees, solving past crimes, and possibly preventing future ones. (*United Sates v. Kincade* (9th Cir. 2004) 379 F.3d 813, 838-839; *United States v. Sczubelek* (3rd Cir. 2005) 402 F.3d 175, 185.)

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[7] Thornburg also argues, solely to preserve the point for further review, "*King* was wrongly decided and should be overruled." Of course, we are required to follow *King*. (*Rodriguez de Quijas v. Shearson/American Exp., Inc.* (1989) 490 U.S. 477, 484; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

In our estimation, the minor intrusion caused by collecting DNA from all adult felony arrestees must give way to the government's compelling interests. And, in any event, we believe the buccal swab collection procedure is not materially more invasive than fingerprinting which has long been approved for identifying arrestees.

For these reasons, we hold collection of DNA samples from adult felony arrestees under sections 296(a)(2)(C) and 296.1(a)(1)(A) does not violate the Fourth Amendment. These statutes are constitutional on their face and as applied in this case.

Once more, the courts correctly denied Thornburg's motions to suppress.

3. The Confrontation Clause – People v. Sanchez and Crawford v. Washington

Thornburg contends Judge Kimberly K. Menninger erred by admitting testimonial hearsay through the prosecution's DNA expert witness at trial, in violation of the California rules of evidence and the Sixth Amendment. Again, we disagree.

This case was tried before our Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). At that time, California law permitted an expert witness to explain to the jury the "matter" upon which he relied, even if that matter would have ordinarily been inadmissible. (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) And when that inadmissible matter was case-specific hearsay, the expert was permitted to relate it to the jury, on the theory it was not being admitted for the truth of the matter asserted, but instead merely to explain the bases for the expert's opinion. (*Id.* at pp. 673, 684.)

However, *Sanchez* concluded this paradigm was no longer tenable. (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) The court explained: "If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Id.* at p. 684, fn. omitted.)

Further, citing *Crawford v. Washington* (2004) 541 U.S. 36, 61-62 (*Crawford*), *Sanchez* noted admission of *testimonial* hearsay through an expert witness against a criminal defendant is also subject to the Sixth Amendment's confrontation clause; which clause is violated, "unless (1) the declarant is unavailable to testify and (2) the defendant had a previous opportunity to cross-examine the witness or forfeited the right by his own wrongdoing. [Citations.]" (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

Consequently: "[A] court addressing the admissibility of out-of-court statements must engage in a two-step analysis. The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial* . . . ." (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

A. The DNA Expert's Testimony – Facts and Procedural Background

The prosecution's DNA expert at trial was Jillian Zoccoli, a forensic scientist in the DNA unit of the Orange County Crime Lab. Zoccoli was the case manager in this case, and she reviewed the reports and notes covering each step of the standardized DNA testing process to ensure the proper lab protocols were followed. Matthew Nixt, another forensic scientist, also "participate[d] in the testing," but he had left the DNA unit before trial.

Several DNA swabs were submitted for testing, including swabs taken from evidence collected at the Walmart crime scene. When asked about the coffee cup, Zoccoli reviewed "the examination notes" in the case file to refresh her recollection, and testified, "The swabs from the cup were received by Matthew Nixt on April 7, 2010." Defense counsel objected on hearsay and foundation grounds, and the court overruled the objections, citing the business records exception.

Next the prosecutor asked Zoccoli how the swabs from the coffee cup were packaged when Nixt received them, and she replied, "It was in a sealed manila envelope." Defense counsel objected again on hearsay and foundation grounds, arguing, "There's no evidence that this witness actually saw this envelope or this package." The court overruled the objections, stating, "I believe it does fall within the hearsay exception to official records and the business rule."

Over a continuing foundation objection, Zoccoli testified the manila envelope contained four smaller envelopes which each contained a swab. These swabs contained DNA collected from the coffee cup and cup lid. To prepare for DNA testing, "The swabs were excised, which means that they were cut off of the stick, and the cotton portion was placed into a tube." Nixt then used the Identifiler system to extract the DNA from the cotton and to generate a DNA profile from it.

The lab also received Thornburg's buccal swab sample.[8] Again, the swabs were cut, and the cotton separated from the stick and placed in a tube, although the record is unclear who performed this part of the test. Zoccoli said "they" used the Identifiler Plus (also referred to as Profiler Plus) system to extract the DNA from Thornburg's buccal swab sample, and they generated a single, male DNA profile from it.

Zoccoli personally compared the DNA profiles from the buccal swabs and from the coffee cup and cup lid swabs. Zoccoli also prepared a chart showing her comparison of the two samples (exhibit 21), which incorporated part of the DNA profile from the coffee cup and lid samples. She testified, "[t]he same profile was obtained from the DNA standard from Timothy Thornburg as the samples from the cup lid and the exterior of the cup." She calculated a one in one trillion chance any other person would share that DNA profile.

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[8] The parties stipulated Thornburg's buccal swab sample had been properly collected, packaged in a sealed manila envelope, and booked into evidence.

On cross-examination, Zoccoli admitted Nixt was not the only other forensic analyst who was involved in different stages of the DNA testing procedure, but only Nixt produced a report. Regardless, Zoccoli herself reviewed the data, and she personally performed the DNA comparison.

B. Step One - The Traditional Hearsay Analysis

Thornburg argues: "Nixt's report was inadmissible hearsay; it did not fall under the business record exception." (Evid. Code, § 1271.) Not so.

Nixt's report was not marked for identification or admitted into evidence, and it is not part of the appellate record. Based upon Zoccoli's trial testimony, it appears Nixt's report consisted of two categories of information.

The first category was the DNA profile generated by the Identifiler system from the coffee cup and lid samples. Nothing suggests it contained any statement from Nixt attesting to the validity of the data shown. Further, the Identifiler system is not a declarant, and the data printout is not a statement. So, the Identifiler DNA profile in Nixt's report is not hearsay. (*People v. Lopez* (2012) 55 Cal.4th 569, 583 (*Lopez*).)

The second category was the notes written by Nixt as a record of his own observations and actions; and they included the details of how and when he received the DNA swabs from the coffee cup and lid, and what he did to prepare them for analysis by the Identifiler system. Nixt's notes are hearsay (Evid. Code, §§ 135, 225, 1200), but they were properly admitted under the business records exception (Evid. Code, § 1271).

Zoccoli's testimony proved Nixt's notes were made in the regular course of the lab's business, at or near the time of the act, condition or event recorded. (Evid. Code, § 1271, subds. (a), (b).) She was the custodian of Nixt's notes, and she explained their identity and mode of preparation. (*Id*., subd. (c).) Finally, Zoccoli said Nixt's work was performed and his notes were prepared, using standard lab procedures, and subject to multiple layers of review, all of which indicates trustworthiness. (*Id*., subd. (d).)

Nothing more was required to apply the business records exception.

C. Step Two - The Testimonial Hearsay Analysis

Thornburg next argues Nixt's report was *testimonial* hearsay, and Zoccoli's testimony about it violated his Sixth Amendment rights.[9] He is simply mistaken.

As noted, the Identifiler DNA profile in Nixt's report is not hearsay at all. But even assuming it is hearsay and testimonial, no Sixth Amendment violation appears. "Not yet considered by the United States Supreme Court is whether the prosecution's use at trial of a machine printout violates a defendant's right to confront and cross-examine the machine's operator when, as here, the printout contains no statement from the operator attesting to the validity of the data shown." (*Lopez*, *supra*, 55 Cal.4th at p. 583.)

The California Supreme Court has agreed with other federal appellate courts that have upheld the use of such printouts. (*Lopez*, *supra*, 55 Cal.4th at p. 583.) "Because, unlike a person, a machine cannot be cross-examined, here the prosecution's introduction into evidence of the machine-generated printouts shown in . . . [nontestifying analyst's] laboratory report did not implicate the Sixth Amendment's right to confrontation." (*Ibid*.) This logic applies with even greater force here, because the prosecution did not introduce the Identifiler-generated DNA profile into evidence.

Nixt's notes of his own observations and actions are not testimonial, because they do not "meet the high court's requirement that to be testimonial the out-of-court statement must have been made with formality or solemnity. [Citations]." (*Lopez*, *supra*, 55 Cal.4th at p. 584; see *Davis v. Washington* (2006) 547 U.S. 813, 830, fn. 5 ["formality is indeed essential to testimonial utterances"]; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 310 (*Melendez-Diaz*) [stressing laboratory certificate determined to be testimonial was "a '"solemn declaration or affirmation"'"].)

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[9] The Attorney General argues Thornburg forfeited his Sixth Amendment claim by failing to object on this grounds below. We elect to address the merits because *Sanchez* changed California law governing expert witness hearsay testimony, and because Thornburg asserts any forfeiture was due to ineffective assistance of counsel.

Nixt's notes are like the nontestifying blood-alcohol analyst's chain of custody log sheet notes, that our Supreme Court found to be nontestimonial in *Lopez*. (*Lopez, supra*, 55 Cal.4th at pp. 582-584.) Neither the testifying or nontestifying analyst signed, certified, or swore to the truth of the notes at issue, which showed only numbers, abbreviations, and one-word entries under specified headings, and thus were "nothing more than an informal record of data for internal purposes . . . ." (*Id*. at p. 584.) "Such a notation, in our view, is not prepared with the formality required by the high court for testimonial statements." (*Ibid*.)

Nixt's notes are also like the nontestifying pathologist's notes describing his anatomical and physiological observations about the condition of the body, that were held to be nontestimonial in *People v. Dungo* (2012) 55 Cal.4th 608, 619. Our Supreme Court explained: "These statements, which merely record objective facts, are less formal than statements setting forth a pathologist's expert conclusions. They are comparable to observations of objective fact in a report by a physician who, after examining a patient, diagnoses a particular injury or ailment and determines the appropriate treatment. Such observations are not testimonial in nature." (*Id*. at p. 619.)

Nixt's notes are not like the nontestifying laboratory certificates determined to be testimonial in *Melendez-Diaz* and *Bullcoming v. New Mexico* (2011) 564 U.S. 647 (*Bullcoming*). In *Melendez-Diaz*, "[t]he certificates were sworn to before a notary" by the testing analysts who had prepared the certificates. (*Melendez-Diaz*, at p. 308.) And in *Bullcoming*, the laboratory analyst's certificate regarding the result of his analysis was "'formalized' in a signed document" that expressly referred to court rules providing for the admissibility of such certificates in court. (*Bullcoming*, at p. 665.) Such formality is lacking here. Hence, we need not consider whether Nixt's notes were prepared "for the primary purpose of accusing a targeted individual." (*Williams v. Illinois* (2012) 567 U.S. 50, 84 (plur. opn. of Alito, J.) (*Williams*); see *Lopez, supra*, 55 Cal.4th at p. 582.)

Lastly, in *People v. Barba* (2013) 215 Cal.App.4th 712 (*Barba*), the court conducted an exhaustive analysis of whether admission of nontestifying DNA analyst reports violates the Sixth Amendment after *Melendez-Diaz*, *Bullcoming*, and *Williams*. Thornburg did not cite *Barba* in his opening or reply briefs. But the Attorney General did briefly mention *Barba* so we will too. Suffice it to say, "So long as a qualified expert who is subject to cross-examination conveys an independent opinion about the test results, then evidence about the DNA tests themselves is admissible." (*Id*. at p. 742.)

Therefore, we conclude the court did not err in permitting Zoccoli to relate to the jury details of the Identifiler DNA profile or the notes contained in Nixt's report.

4. The Sentencing Issue – Section 654

The court imposed sentence on count 1 (robbery) and count 2 (burglary), but was required to stay the sentence on count 2. (§ 654, subd. (a); *People v. Centers* (1999) 73 Cal.App.4th 84, 98-99; *People v. Radil* (1977) 76 Cal.App.3d 702, 713.)

DISPOSITION

The sentence imposed on count 2 is stayed pursuant to section 654. The clerk of the superior court is directed to modify the abstract of judgment to reflect the stay, and to forward a copy of the modified abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

_____
THOMPSON, J.

I CONCUR:

_____
ARONSON, J.

O'LEARY, P.J., Concurring and Dissenting.

I concur in the result but disagree with the majority's reasoning. Although I agree Timothy Lee Thornburg's arrest was lawful, I disagree there was probable cause to arrest him for violating Penal Code section 148, subdivision (a). Thus, I respectfully dissent from that portion of the majority opinion's reasoning.

The facts are largely uncontested. Hewitt testified he observed Thornburg skateboarding in the street in violation of San Clemente Municipal Code section 10.64.020, subdivision (A). A violation of this code section is an infraction that normally results in a citation at the scene. Hewitt approached Thornburg from behind to make a pedestrian stop. Hewitt first turned on the steady red emergency light on the top of his patrol vehicle.

The majority indicates when Hewitt turned on his red light, Thornburg turned around. (Maj. opn. *ante*, at p. 9.) Yet, Hewitt testified that it was not until he had activated "the flashing red and blue lights and [he] had [chirped] [his] siren to get [Thornburg's] attention" that Thornburg turned around. Hewitt could not recall if Thornburg turned around in response to the flashing red and blue lights, but he was clear Thornburg looked back when he chirped his siren. When Thornburg turned around, he waved his hand, turned back around the other way, and continued to skateboard down the street. At this point, Hewitt used his loudspeaker and told Thornburg to stop. Thornburg put down one of his feet and slowed down, but he did not immediately stop. Hewitt estimated that approximately 15 seconds passed from the time Thornburg turned around in response to the flashing lights and he came to a complete stop.

After Thornburg stopped, Hewitt approached him and asked Thornburg to put his skateboard down. Thornburg complied immediately and without protest. Thornburg asked Hewitt why he stopped him. Hewitt explained skateboarding in the street was a violation of the San Clemente Municipal Code. Thornburg told Hewitt

another officer told him it was okay to skateboard in the street. Thornburg disputed Hewitt's understanding of the municipal code and continued to argue with Hewitt. This discussion lasted about 30 seconds. Hewitt noticed bulges in Thornburg's front pants pockets as round as the size of a baseball. As Thornburg continued to argue the legality of the stop, Hewitt called for backup. Hewitt asked Thornburg for permission to search him, and Thornburg refused. Thornburg continued to be verbally aggressive saying he was tired of being harassed by the police and was waving his arms in the air.

Hewitt again asked Thornburg for permission to search him, and Thornburg refused. After Thornburg refused, Hewitt asked Thornburg several more times if he could search him. When backup arrived, Hewitt continued to explain to Thornburg that he had a right to search him. Thornburg never gave permission. Hewitt directed Thornburg to sit on the curb in front of his police unit, and Thornburg complied.

At this point, Hewitt called his sergeant to discuss the issue of delaying an officer in his duties. Hewitt testified the sergeant told him that "[I]t's a [Penal Code section] 148 [violation] if he's denying me to pat him down in the course of my duty." Hewitt walked back to Thornburg, who was sitting on the curb with the back-up officer standing next to him. Hewitt again asked Thornburg if he was going to allow a patdown search. When Thornburg did not consent, Hewitt arrested him for delaying an officer in the course of his duties. Nothing in the record indicates Thornburg resisted in any way when Hewitt arrested him.

Relying on Thornburg's delay in responding to Hewitt as the basis for the arrest, the Attorney General argues, "By taking approximately 30 seconds [from the time Hewitt chirped his siren] to finally come to a complete stop, [Thornburg] willfully delayed a peace officer in violation of [Penal Code] section 148, subdivision (a)(1)." The majority apparently agrees and concludes there was ample evidence to support the trial court's rulings. (Maj. opn. *ante*, at p. 9.) The ample support the majority cites is

Thornburg's delay in stopping, his aggressive and combative behavior, and his stubborn refusal to accept Hewitt's explanation for the stop and detention. (Maj. opn. *ante*, at pp. 9-10.) I do not find ample support for the arrest.

I agree with the majority that we must examine the events leading to the arrest, and then decide "'"'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to" probable cause . . . .' [Citation.]" (*People v. Turner* (2017) 13 Cal.App.5th 397, 404-405.) (Maj. opn. *ante*, at p. 9.) A delay of 15 seconds was insufficient to establish a reasonable person would have a strong suspicion that a violation of Penal Code section 148, subdivision (a), had been committed. (Maj. opn. *ante*, at p. 10.) The majority indicates Thornburg engaged in "aggressive and combative" behavior. (Maj. opn. *ante*, at p. 9.) I find no facts in the record to support this conclusion.

Thornburg's only alleged aggressive behavior was verbal aggression in the form of argument. And Thornburg's only physical movement was "waving his arms" while protesting his arrest. I find neither of these facts sufficient to conclude Thornburg was aggressive and combative or otherwise threatening Hewitt. There is ample evidence Thornburg was argumentative and Thornburg insisted he did not believe he violated the municipal code and maintained another officer had told him "it was okay to do so as long as he obeyed the rules." But that was insufficient evidence of a threat to Hewitt.

When Hewitt asked Thornburg to put down his skateboard, Thornburg complied. When Hewitt directed Thornburg to sit on the curb in front of the patrol car, Thornburg complied. Nothing in the record suggests Thornburg offered any resistance as Hewitt arrested him. That Thornburg insisted he believed his conduct was lawful based on what another police officer had told him is not conduct that an objectively reasonable police officer would believe constitutes probable cause to arrest an individual for a violation of Penal Code section 148, subdivision (a). The record is very clear that both

Hewitt and his sergeant believed the refusal to give consent was a violation of Penal Code section 148, subdivision (a). This suggests that both Hewitt and his sergeant did not even have a subjective belief the delay in stopping constituted a violation of Penal Code section 148, subdivision (a).

When a peace officer is investigating a suspect for criminal activity, and the officer has a reasonable belief the person may be armed and dangerous, "a carefully limited search of the outer clothing" is permissible. (*Terry v. Ohio* (1968) 392 U.S. 1, 30 (*Terry*).) Hewitt testified he wanted to search Thornburg because "he had bulges in his pockets" and he was "arguing the issue for the stop." Hewitt conceded none of the items seized during the search incident to arrest could reasonably be mistaken for a weapon inside someone's pocket. If Hewitt had a reasonable belief Thornburg was armed and dangerous, he could have conducted a patdown search without obtaining consent. But that would only have authorized Hewitt "to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." (*Terry, supra,* 392 U.S. at p. 30.)

I recognize police officers' lives and safety "weigh heavily" in balancing Fourth Amendment considerations and "[t]he judiciary should not lightly second-guess a police officer's decision to perform a patdown search for officer safety." (*People v. Dickey* (1994) 21 Cal.App.4th 952, 957.) But the facts do not support a reasonable belief Hewitt thought Thornburg was armed or dangerous. What the facts clearly suggest is that Hewitt was intent on seeing what was in Thornburg's pockets. Had Hewitt simply written Thornburg a citation for violation of the municipal code, no one would have been delayed. Had Hewitt conducted a patdown search for officer safety, Hewitt likely would not have felt any item he could identify as a weapon. Intrusion into Thornburg's pockets occurred only because of his arrest.

Although I find there was no probable cause to arrest Thornburg for violating Penal Code section 148, subdivision (a), the analysis cannot end with this finding. In *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 323 (*Atwater*), the United States Supreme Court upheld a custodial arrest for a violation of Texas's seatbelt law, an offense punishable by a fine of not less than $25 nor more than $50. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*Id*. at p. 354.)

In *People v. McKay* (2002) 27 Cal.4th 601, 608 (*McKay*), our Supreme Court addressed the issue of arrest in the context of a Vehicle Code section stop. The Supreme Court noted that with "the passage of Proposition 8, we are not free to exclude evidence merely because it was obtained in violation of some state statute or state constitutional provision." (*Id*. at p. 608.) Relying on *Atwater*, the *McKay* court found "there is nothing inherently unconstitutional about effecting a custodial arrest for a fine-only offense." (*Id*. at p. 607.) The court held that *Atwater* foreclosed a defendant from challenging a custodial arrest on Fourth Amendment grounds following a valid traffic stop. (*Id*. at p. 607.)

Based on the evidence presented in the trial court, Hewitt made a valid traffic stop. Although I conclude there was no probable cause to arrest him for violating Penal Code section 148, subdivision (a), under *Atwater* and *McKay*, Thornburg was subject to arrest because Hewitt observed him violating a municipal code section. On this basis, I would affirm the lower court's denial of the motion to suppress.

_____

O'LEARY, P. J.